Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1997

CHARLENE MCGOWAN,

Petitioner

TEXACO INC.

Respondent

On Petition For Writ Of Certiorari
To The Court of Appeals, Second Circuit,
Having Reaffirmed the Decision of the
United States District Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, on the motion for summary judgment, the lower courts are free to disregard their responsibilities under the substantive law articulated by the United States Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) and embodied in Rule 56 of the Federal Rules of Civil Procedure with respect to the Petitioner's employment discrimination and retaliation claims, and thereby effectively denying the Petitioner her right to a jury trial under the Civil Rights Act of 1964, as amended in 1991.

2. Whether, on the motion for summary judgment, the lower courts failed to properly apply the substantive employment discrimination law as articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) to the Petitioner's retaliation claim, thereby imposing an evidentiary burden on the Petitioner not contemplated by the Civil Rights Act of 1964, as amended in 1991.

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No. 97-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

CHARLENE MCGOWAN,

Petitioner,

vs.

TEXACO INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JURISDICTION

On April 4, 1996, a Memorandum and Order was rendered in favor of Texaco Inc. by the Honorable Charles L. Brieant of the United States District Court for the Southern District of New York. On May 2, 1996, a Notice

of Appeal was filed with the United States Court of Appeals for the Second Circuit. On March 21, 1997 the Court of Appeals affirmed the judgment of the District Court by Summary Order and Memorandum Decision. On April 2, 1997 a Petition for Rehearing and Rehearing In Banc was filed, and on June 6, 1997, the Court of Appeals upheld the judgment of the District Court.

The jurisdictional basis for a writ of certiorari is based upon Rule 10(a) and (c) of the Rules of the Supreme Court of the United States. This petition for a writ of certiorari has been brought to protect individual rights guaranteed to the Petitioner under the Civil Rights Act of 1964, as amended in 1991, and to reverse the state of confusion created by the decisions of the lower courts' in the Second Circuit and other circuits in determining how the rules of summary judgment apply to the substantive employment discrimination law.

STATEMENT OF CASE

The Petitioner, Charlene McGowan, brought this action against her former employer, Texaco Inc., alleging (i) sex discrimination in the terms and conditions of her employment, and retaliation by Texaco for a complaint of sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e et seq., and the New York Human Rights Law, N.Y. Executive Law Sections 290 et seq., and (ii) intentional infliction of emotional distress under New York Common Law. The United States District Court for the Southern District of New York (i) granted summary judgment in favor of Texaco and dismissed the Petitioner's federal claims on the ground that Texaco had asserted an adequate basis for the

employment action taken against the Petitioner, and (ii) dismissed the Petitioner's state claims without prejudice.

In November 1990, the Petitioner was hired by Texaco into a position as a Environmental Analyst II. The Petitioner's position placed her in a work unit otherwise known as the Central Waste Site Management Unit ("Unit") of the Environment, Health and Safety Division ("Division") at Texaco's Beacon, New York facility. Prior to the time she was hired by Texaco, the Petitioner submitted a resume and a form of job application provided to her by Texaco. Thereafter the Petitioner interviewed with Ronald Richards ("Richards"), the manager of the Division, and Harold Weiss ("Weiss"), the manager of her Unit, and other employees within her team. The Petitioner also provided Weiss with a copy of her college transcript. The Petitioner's college transcript showed significant science-related work. The Petitioner also obtained an official copy of her college transcript directly from Bard College and Texaco required that the Petitioner physically produce her diploma on her start date. Prior to accepting the position as an Environmental Analyst II, the Petitioner worked for a five-month period at Texaco's research labs located at the Beacon facility.

In her job application, the Petitioner emphasized her prior work experience and attached thereto copies of her college transcripts and two forms of resume showing her health and human services background as well as her insurance background.

After several months of employment, the Petitioner initiated discussions with Weiss concerning the terms and conditions of employment. The Petitioner sought

developmental opportunities, including training and job assignments which dealt with the primary, relevant tasks of her unit--environmental pollution and remediation. Weiss rebuffed her efforts to secure training and assignments and responded by stating to the Petitioner (i) your job function didn't require a degree, (ii) you're behaving "bitchy", and (iii) you should accept things. Weiss had no prior experience managing the career of a professional woman. His prior management experience with respect to women was limited to supervising the activities of secretarial personnel.

On July 12, 1991, Weiss provided the Petitioner with a five-minute version of the annual performance and development review, a part of Texaco's performance management program ("Performance Management Program"). Prior to that date Weiss failed to provide the Petitioner with any coaching or feed back on her performance and offered no overall career development. During this five minute meeting, the Petitioner was given a "good" evaluation, and in October 1991 she received an above average salary increase.

Following a company-wide video tape presentation on or about October 31,1991, concerning the company's equal employment opportunities for women and minorities and Texaco's nondiscriminatory policies, the Petitioner appeared at Beacon's Human Resource department to complain about the discriminatory treatment she was receiving from her immediate supervisor, Weiss. Personnel in the Human Resources requested that she submit her complaint in writing, and on November 2, 1991 the Petitioner delivered her written complaint to Walter Foucher and Mark Thumen, a manager and employee, respectively, in the Human Resources department. Foucher then contacted Texaco's corporate headquarters, its in-house legal department, Richards, and

John Moylett, to apprised them of the Petitioner's sex discrimination complaint. According to Donald Annett, a Corporate Vice President, it was the Human Resources Department that was responsible for investigating these complaints of discrimination pursuant to company policy. Richards then advised Foucher that the matter would be handled by John Moylett, another Human Resource Manager. However, Moylett denied that he was made aware of the existence of the complaint by either Richards or Foucher. Foucher denied knowing whether or not Moylett or Richards investigated the Petitioner's complaint, but indicated it was Moylett's duty to investigate. Moylett indicated it would be a violation of company policy calling for the investigation of complaints, if Richards failed to turn over a sex discrimination complaint to him. Moylett also said that during a conversation with Foucher, Foucher denied that the Petitioner ever submitted a written complaint to Human Resources.[1]

Richards then arranged to meet with the Petitioner, and during that meeting the Petitioner apprised Richards of the discriminatory nature of her complaint to Human Resources. Richards asked plaintiff not to notify Texaco's corporate headquarters about her complaint and not to mention her complaint to others. Richards also indicated to

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[1] On August 16, 1993, Foucher swore under oath that the document he received from the Petitioner was a complaint of sex discrimination. Foucher further indicated that he promptly notified corporate headquarters and the legal department of the existence of this complaint to "cover his butt." During a second deposition of Foucher on September 13, 1994 -- just five days after Moylett swore under oath that Foucher and Richards did not make him aware of the existence of the Petitioner's complaint--Foucher testified that in November 1991 her complaint was not perceived as a complaint of sex discrimination "it could have been confused with sex discrimination...".

the Petitioner that "we'll stop talking if you stop talking." Richards not only failed to notify Moylett, his Human Resource manager, of the discriminatory allegations contained in the complaint, but also failed to provide a written copy of the complaint to anyone. It appears that the Petitioner later sent a copy of her complaint to Moylett. On or about the early part of December 1991, Richards and Weiss proceeded to solicit derogatory employment information from employees both inside and outside of the Petitioner's work Unit. The timing of the reports -- which were made to managers Weiss and Richards by lower level employees -- as well as the substance of these reports, clearly indicate that Richards and Weiss received only derogatory information about the Petitioner. Simultaneously, Weiss and Richards began documenting alleged employment deficiencies on the part of the Petitioner. The Petitioner became suspicious of their activities against her, and actually overheard a conversation between Richards and Weiss wherein one said to the other "lets get something on her before she gets something on us." Simultaneously with initiating her complaint of sex discrimination, Foucher agreed to assist the Petitioner with the review of her performance review, dated July 12, 1991. The Petitioner believed she should have received a performance rating better than the "good performance" rating she received from Weiss on July 12, 1991. An appeals process was initiated which resulted in a finding (i) Richards on December 12, 1996, and (ii) by the appeals committee on January 10, 1992 -- to affirm her "good performance" rating.

On or about December 5, 1991, the Petitioner was advised by William Bidding, an employee in the Texaco's Research and Development division at the Beacon facility, that he heard there were twelve or thirteen complaints of

discrimination lodged against Texaco. Bidding relayed this information to the Petitioner in her office following a meeting Bidding attended near the Petitioner's work Unit. Thereafter, the Petitioner repeated what she had heard from Bidding to other employees, and also repeated the information to Moylett, the Division's Human Resources Manager.

On December 9, 1991, Richards threatened the Petitioner with termination as a result of her " blatantly false statements" to fellow employees about other complaints of discrimination and severely disciplined her. Richards advised the Petitioner of the utter falsity of her remarks, although other evidence suggests that he secretly knew that another employee, Bidding, actually made these remarks to the Petitioner. The Petitioner was visible shaken and upset. In a series of draft memoranda, dated December 11, 1991, Richards documents his escalating hostility toward the Petitioner. . Thereafter, Richards orchestrated a variety of activities and initiated actions designed to undermine the Petitioner's performance and poison her work environment. These activities included surveillance, extensive record keeping, and even a daily log on all of her activities including the time she spent in the bathroom. During a January 30, 1992 meeting between Weiss and the Petitioner, the Petitioner first became aware of her purported unsatisfactory performance, and Weiss and Moylett offered the Petitioner a fresh start on a "clean slate". During a January 30, 1992 meeting, the Petitioner took great exception to this characterization of her performance as unsatisfactory, and she became visibly upset.

Texaco and Texaco's legal department proceeded to build a case of poor performance, which involved a massive

audit of the Petitioner's work history and education. These actions were taken presumably to support all available defenses to the Petitioner's charges, including possibly an after-acquired evidence defense. Texaco asserts that the Petitioner falsely reported her degree and major concentration of studies in her employment application and resume. However, Texaco requested an official transcript of the Petitioner's educational studies which was received by Texaco prior to the commencement of her employment. In addition, Texaco required that the Petitioner physically transport her degree to the Beacon facility for photocopying, which was accomplished at or before the commencement of her employment in November 1990. The Petitioner's college transcripts show that she completed approximately 56 college credits in science-related course work. Texaco's defense also included extensive depositions of her former employers, and efforts to solicit derogatory, irrelevant information about her back to her college experiences a decade earlier.

It became increasingly clear to the Petitioner in February 1992 that Richards was determined to terminate her employment. On February 26, 1992, the Petitioner reported to Texaco's medical department at its Beacon facility due to severe work stress precipitated by Richards threats of termination, and after discovering that all of the members of her work unit were assisting Richards in their defense. Texaco's own medical records show that the Petitioner's tearful visits to Texaco's medical department did not start until January 1992, a full month after the date she complained. The next day, Richards advised the Petitioner that she was suspended from further job activities, and shortly thereafter Richards made a management referral to Special Health Services. Richards then demanded as a condition of her employment that the Petitioner submit to a

psychiatric exam.

On July 1, 1992, the Petitioner returned to work to discover that her position as an Environmental Analyst II had been abolished. Instead, the Petitioner was assigned to the position of a Product Safety Specialist II, a position requiring substantially less skill and offering fewer career opportunities. The Petitioner was placed under the direct supervision of Cynthia Cain, an employee who previously provided Richards with derogatory information about the Petitioner at Richards' request. The Petitioner continued to be watched and her activities were reported to Richards. A log of her daily activities was maintained by Cain. Richards continued to be critical of the Petitioner behind the scenes. The Petitioner's performance management planning process was micro-managed for the purpose of insuring her unsatisfactory performance and ultimate failure. Her performance review cycles were contrary to Texaco's policy in that the Petitioner's performance was reviewed on a monthly basis subsequent to July 1, 1992, and then on a weekly basis in December, 1992. These records show that the Petitioner was doomed to failure. The Petitioner was terminated by Texaco on January 25, 1993, purportedly for poor performance.

ARGUMENT

Point I

Whether, on the motion for summary judgment, the lower courts are free to disregard their responsibilities under the substantive law articulated by the United States Supreme Court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)

and embodied in Rule 56 of the Federal Rules of Civil Procedure with respect to the Petitioner's employment discrimination and retaliation claims, and thereby effectively denying the Petitioner her right to a jury trial under the Civil Rights Act of 1964, as amended in 1991.

* * *

Summary judgment is not appropriate when the pleadings, depositions, affidavits and other evidence show genuine issues of material fact. In determining whether summary judgment is appropriate, the Petitioner as the non-moving party is entitled to certain evidentiary benefits under Rule 56 of the Federal Rules of Civil Procedure and the substantive law articulated in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) and Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). First, the scope of the lower courts' inquiry is limited to a determination of whether there is a sufficient factual disagreement between the parties. Second, in performing this function the lower courts must draw all reasonable inferences in favor of the Petitioner. More properly stated, the Court must identify all plausible inferences from the direct and circumstantial evidence in the record that favor the Petitioner. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) and Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Third, the lower courts' are required to view the direct and circumstantial evidence in a light most favorable to the Petitioner. U.S. v. Diebold, Inc., 369 U.S. 644 (1962). According to the vast majority of Circuit Courts this task is even more critical in employment discrimination cases where direct evidence of retaliatory intent is difficult to find "precisely because it's practitioners deliberately try to hide it." Chambers v. TRM Copy Centers Corporation, 43 Fed. 3d 29 (Second Circuit 1994). In most cases the Petitioner must rely primarily on circumstantial

evidence. For this reason the lower courts' must be forced to carefully examine the circumstantial evidence offered by the Petitioner. The lower Courts cannot simply ignore the circumstantial evidence which in many employment discrimination cases will illuminate the material factual differences between the parties. Fourth, credibility determinations, weighing of evidence and the task of actually drawing the inferences are solely jury functions. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). The lower courts have no authority to decide issues of fact, they can only determine whether issues of fact exist. In the instant case the lower courts failed to afford the Petitioner the aforesaid evidentiary benefits as the non-moving party.

With respect to the Petitioner's discrimination claim, the Second Circuit concluded that:

> [a]ll of [Texaco's]...decisions were entirely justified...by the undisputed fact that the men who received these opportunities were employed as engineers, which McGowan was not, and were senior to McGowan. (emphasis supplied).

The Petitioner never disputed that Texaco could treat its employees differently based on their respective backgrounds and education. What the Petitioner claims as discriminatory is the complete absence of career development for the Petitioner by her immediate supervisor Harold Weiss. The record establishes that Weiss did not engage in any career development for Petitioner during the period from November 1990 through July 12, 1991 when Weiss sat down with her for five minutes to give her an annual review of her performance. There was no prior performance planning or

coaching afforded to the Petitioner as required by Texaco's very own Performance Management Program. Stray remarks made by Weiss to the Petitioner were further evidence of Weiss' overall discriminatory attitude toward the Petitioner when she sought career development. Finally the Petitioner offered affidavits of other women working at Texaco which indicated that Texaco's actions with respect to the Petitioner "conform to a general pattern of discrimination" against women, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Petitioner also offered confidential documents of Texaco as further proof of the general pattern of Texaco's failure to afford equal opportunities to women and minorities. All of these facts were ignored by the lower Courts in examining the Petitioner's discrimination claims.

With respect to the Petitioner's retaliation claim, the Second Circuit decided that the Petitioner did not submit evidence raising a jury question on causation. Specifically, the Second Circuit determined that:

> "[o]n this record any rational fact finder would have to find that what McGowan characterizes as retaliation was at least partly motivated by legitimate dissatisfaction with McGowan's performance and would have occurred absent any retaliatory or discriminatory animus. Such a finding is sufficient to preclude liability for an employer. See Cosgrove v. Sears, Roebuck & Co., 9 Fed. 3d 1033, 1040 (2d Cir. 1993).

(Emphasis supplied).[2]

Based on the Second Circuit's statement, it is clear that the Second Circuit believed that the Petitioner established a prima facia case of retaliation. However, in assessing the issue of causation--what actually motivated the employer--it is clear that the Second Circuit did not afford the Petitioner the evidentiary benefits of summary judgment on her retaliation claims, and the Second Circuit actually jumped outside the scope of the substantive law by deciding that some of Texaco's employment actions may have been motivated by legitimate dissatisfaction with the Petitioner's performance. This was a question for a jury to decide not the lower courts. With respect to the issue of Texaco's motive, the lower courts engaged in credibility determinations (finding that Texaco was legitimately dissatisfied with her performance), weighing of evidence (finding the adverse employment action would have occurred absent any retaliatory or discriminatory animus), and actually drawing [rather than identifying] inferences which are solely the function of a jury (concluding that the retaliation was partly motivated by Texaco's legitimate dissatisfaction with her performance). The effect of this decision is to substantially undermine the Supreme Court's decisions in

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2

It appears that by citing to Cosgrove v. Sears, Roebuck & Co., 9 Fed. 3d 1033 (2d Cir. 1993), the Second Circuit is attempting to apply a Price Waterhouse analysis to the pre-trial stages in this litigation. The Cosgrove court applied the Price Waterhouse analysis after a trial. The fact that a mixed motive exists in this case demonstrates that summary judgment is inappropriate and requires a jury trial to determine whether the employer was truly motivated by its articulated reason at the time of its decision. Price Waterhouse v. Hopkins, 490 U.S. 228, 252 (1989). This is a glaring example of the Second Circuit usurping the Petitioner's right to a jury trial under the Civil Rights Act of 1964, as amended in 1991.

McDonnell-Douglas Corp. v. Hicks, 411 U.S. 792 (1973) and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993), and to deny the Petitioner her right to present her entire case to a jury, a right given to her under the 1991 amendments to the Civil Rights Act of 1964.[3]

The evidence in the record before the lower courts raised material factual issues which should have precluded summary judgment on the Petitioner's retaliation claims. As previously mentioned, it is evident from the Second Circuit's decision that the Petitioner established a prima facie case of retaliation. Without even assessing the evidence in a favorable light to the Petitioner, the Second Circuit concluded in the dark that the Petitioner "has not submitted evidence raising a jury question on the issue of causation." The Petitioner submits that summary judgment is inappropriate in this case since the evidence offered by the Petitioner in establishing a prima facie case of retaliation in combination with (i) the additional direct evidence offered by the Petitioner in the form of affidavits of other female employees that indicated Texaco's actions "conform to a general pattern of [retaliation and] discrimination" against women, McDonnell Douglas, 411 U.S. 792 (1973), and (ii) strong evidence of "pretext", standing together satisfy the Petitioner's burden at the summary judgment stage.[4] The evidence offered by the Petitioner of "pretext" is strong

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Testimonial evidence is crucial in these cases, since the jury's disbelief of the employer's reasons can support a finding of intentional discrimination and retaliation.

4

See Point II hereinbelow for a discussion of the legal standards which should be adopted by this Court on motions for summary judgment.

because it shows that a jury could conclude Texaco did not give an honest explanation of its behavior toward the Petitioner. As discussed in Point II hereinbelow, the Petitioner's evidentiary burden has been satisfied since the jury disbelief of the employer's reasons can support a finding of retaliation.

The Second Circuit also erroneously determined that the "actions McGowan asserts were retaliatory including her eventual discharge, were clearly and indisputably justified by overwhelming and uncontradicted evidence of McGowan's poor job performance, insubordination and inability or refusal to get along with her co-workers and supervisors." The Petitioner respectfully submits that the lower courts failed to examine the record and were misled by Texaco and its attorneys. The lower courts have assumed that facts are true by accepting as true the conclusory and repetitive recitations offered by Texaco throughout its brief relating to poor performance and insubordination, when in fact these conclusory recitations are not supported by sufficient evidence in the record and not supported by admissible evidence under Rule 56(e) of the Federal Rules of Civil Procedure. A careful examination of the record does not show, as Texaco's suggest, overwhelming and uncontradicted evidence of poor work performance and insubordination. In fact, in support of its motion for summary judgment Texaco offered little "admissible evidence" under Rule 56(e) to establish that Texaco was justified in executing a series of adverse employment actions against the Petitioner because of her poor performance and insubordination. The bulk of Texaco's evidence of insubordination and poor performance involved two incidents concerning an alleged failure by the Petitioner to appear at meetings, and two alleged incidents of poor performance--one involving a large unprocessed check

which Texaco alone claims was discovered in the Petitioner's desk (a fact the Petitioner disputes), and the second involving the alleged misstatement of figures on a report that the Appellee failed to submit as evidence in its motion papers on the issue of Petitioner's poor performance. In fact what Texaco characterizes as "overwhelming and uncontradicted" evidence is embodied in two conclusory allegations found in an affidavit made by a human resource manager with no personal knowledge of the Petitioner's work. (A555).[5]

5

Texaco's honesty with respect to its review of the Petitioner's performance is wholly suspect. In a December 11, 1991 draft memorandum to the Petitioner (A944)--which was not the final version delivered to the Petitioner (final version appears at A1128) reveals that Richard's review of the Petitioner's work indicated "several errors, one being very significant that have occurred since...the time of her performance review". This draft contains handwritten changes which are evidence of Texaco's view of the accuracy of her work since the purported errors were then characterized as "small errors" even though this characterization did not make the final version of Richard's memo to the Petitioner. The final version of the memo actually delivered to the Petitioner contains no reference to unsatisfactory performance, either in terms of accuracy of work or ability to get along with others. It appears from the record that the Petitioner was first advised of her alleged "unsatisfactory performance" during a meeting with Weiss on January 30, 1991 (A895-896), well after her complaint of sex discrimination was lodged. The Petitioner took great exception to this characterization of her performance. (A895-896). It is clear that the Petitioner was not given an opportunity to correct the purported deficiencies in her performance, and was never told in what manner her performance was unsatisfactory, either by Weiss (A895-896) or by Richards (A1034). Collectively all of this evidence sufficiently challenges Texaco's honesty with respect to its explanation of the actions taken against the Petitioner. While there is evidence to suggest that the Appellant did not get along with others, this evidence was generated by Texaco after her complaint of discrimination, despite the fact that some of the incidents reported occurred prior to her complaint. However, a jury could infer from the other evidence offered by the Petitioner of a retaliatory motive and its disbelief of the Texaco's articulated reasons that these reports were generated to document a performance problem that was not perceived as a performance problem until after her complaint.

The Petitioner respectfully submits that in direct violation of the substantive law and Rule 56 of the Federal Rules of Civil Procedure, the lower courts drew inferences in favor of Texaco only, and overlooked significant circumstantial evidence in the record which exposed Texaco's articulated reasons as dishonest--lies.

The actions asserted by the Petitioner to be retaliatory included the following adverse employment actions which were set forth in detail in the Petitioner's motion in opposition to Texaco's motion for summary judgment (A1073 -A1075):

A. The Petitioner was threatened with discharge on five occasions, the first of which occurred December 9, 1991, just thirty-five days from the date of her written complaint (Exhs. 15 & 5).

B. The Petitioner's supervisor's manager, Richards, solicited derogatory information about Petitioner from Petitioner's co-workers beginning as early as December 1, 1991, just thirty days from the date of her written complaint (Exhs. 16 & 5).

C. The Petitioner was placed under constant surveillance by Richards, Weiss and her co-workers, who reported orally and in writing to Weiss and Richards (Exhs. 16 & 5).

D. The Petitioner was labeled in writing as an unsatisfactory performer by Weiss and Richards and first advised of this fact on January 30, 1992 (Exhs. 17 & 5).

E. The Petitioner's PMP appeal was completed on February 10, 1992 in an unfair manner and contrary to Texaco's policy (Exh. 5, pp. 14-15, Exhs. 17, 18 & 1).

F. The Petitioner's PMP for the January 1992 through July 1992 cycle was designed by Texaco to increase the chances of a performance failure on the part of the Petitioner (Exhs. 17, 18, 4 & 5).

G. The Petitioner was the subject of a management referral by Texaco on March 31, 1992 to Texaco's special health service program (Exh. 19).

H. The Petitioner was required by Texaco on May 23, 1992 to submit to a psychiatric evaluation as a condition of maintaining her position with Texaco (Exh. 20).

I. The Petitioner's work was audited by co-workers at the direction of Weiss on November 25, 1991 in order to document unsatisfactory performance (Exh. 4).

J. The Petitioner's position under Weiss was abolished sometime between March 1992 and June 1992 (Exhs. 19 & 21).

K. The Petitioner was assigned to a new position in another unit on July 1, 1992 performing secretarial level work assignments under the direct supervision of Cain (Exh. 5).

L. The Petitioner was the target of a PMP process during the period from July 1, 1992 through January 23, 1993 which for all practical purposes ensured her ultimate demise (Exh. 5, pp. 18-21).

M. The Petitioner was denied a raise during the period from November 2, 1991 through her termination on January 25, 1993 (Exh. 22).

N. The Petitioner was discharged on January 25, 1993 after surviving a two-year campaign of harassment and intimidation (Exh. 5).

It is clear from the record that Texaco elected to challenge just a few of the many actions offered by the

Petitioner as retaliatory.[6] In fact, Texaco offered only the following reasons for the adverse employment actions which it executed against the Petitioner:

1. The Petitioner's spreading of false rumors was the legitimate, non-retaliatory reason for a warning from her supervisors on December 9, 1991. (A1150-A1151).

2. The Petitioner's demand that Texaco investigate her claim of an unfair PMP [performance] rating was the legitimate, non-retaliatory reason for requests for information about her performance. (A1151-A1153).

3. The Petitioner's voluntary four-month medical leave of absence and her own physician's diagnosis were the legitimate, non-retaliatory reasons for the referral to a psychiatrist. (A1153-A1155).

4. The Petitioner's poor performance and voluntary four-month leave of absence were legitimate, non-retaliatory reasons for a change in

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[6] Texaco offered no evidence and put forward no explanation for its actions under items (A), (C), (D), (E), (F), (I), (K), (L) and (M) hereinabove. Since the Petitioner's assertions have not been rebutted by Texaco, the presumption of retaliation established by the Petitioner's prima facie case survives and is sufficient standing alone to preclude summary judgment.

job positions and work units. (A1155-A1156).

5. The Petitioner's poor work performance and insubordination were the legitimate, non-retaliatory reasons for her termination. (A1156-A1158).

6. The undisputed evidence demonstrates that Texaco did not cause the Petitioner's paranoia and poor work performance. (A1158-A1160).

Despite its repetitive and conclusory assertions, Texaco offered little or no proof to legitimize the articulated reasons for its actions. First, Texaco claimed that because the Petitioner was spreading rumors she knew to be false, her supervisor, Ronald Richards was justified in severely reprimanding her and threatening her with discharge. However, Texaco offers no proof that the Petitioner knew that the rumor she was spreading was false. In fact, Texaco's evidence confirms that the Petitioner did not know the rumors were false--she merely repeated the rumors. (Lie No. 1).

Second, Texaco claimed that Richard's request for information from the Petitioner's co-workers was justified because the Petitioner demanded that he investigate her claim of an unfair PMP (performance rating). However, the documentary evidence offered by Texaco (A1152 - Barry Aff., Exh. 4 and 6) does not support this proposition. This evidence demonstrates that the Petitioner wanted someone other than Harold Weiss to actually examine her tangible

work product [paperwork] to arrive at a fair performance rating--something that Weiss failed to do during the period from November 1990 through October 1991, and which Richard's refused to do when purportedly investigating her work performance (A944 and 949). Based on Richard's statement that he refused to examine her work, a jury could reasonably conclude that his investigation of her performance rating was motivated by retaliation rather than giving her a fair assessment of her work. (Lie No. 2).

Third, Texaco claimed that the Petitioner's voluntary leave of absence and her own physician's diagnosis provided the justification for her referral to special health services, and a psychiatric examination. However, Texaco offered absolutely no evidence to support these conclusory assertions. The only evidence offered by Texaco in support of this proposition was a doctor's note dated March 31, 1992 indicating the Petitioner could return to work on April 1, 1992 (A697). Moreover, as Petitioner's affidavit demonstrated there was nothing about her leave of absence that was voluntary (A35). (Lie No. 3).

Fourth, Texaco claimed that the Petitioner's poor performance and four-month voluntary leave of absence justified its change in the Petitioner's job position and work unit. However, as previously mentioned Texaco offered no evidence to show that her separation from her job was voluntary and no evidence to prove her position was actually eliminated. In fact the evidence shows that the Petitioner's job was given to a male employee who reported directly to Richard rather than Weiss. (Lie No. 5).

Fifth, Texaco claims that Petitioner's poor performance and insubordination justified its termination of

the Petitioner's employment. As previously mentioned, little admissible evidence was offered by Texaco to support these propositions. In fact, a jury could reasonably infer that the performance standards imposed by Texaco were more harsh on the Petitioner than those imposed on other employees and were designed, as the Petitioner claims, to insure her ultimate demise.

Point II

Whether, on the motion for summary judgment, the lower courts failed to properly apply the substantive employment discrimination law as articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) to the Petitioner's retaliation claim, thereby imposing an evidentiary burden on the Petitioner not contemplated by the Civil Rights Act of 1964, as amended in 1991.

* * *

In discrimination cases, it is now well settled that an Plaintiff's presentation of a prima facie case creates a legal presumption of unlawful discrimination. This presumption places an obligation upon the employer to produce evidence of a legitimate, nondiscriminatory reason for its actions against the Plaintiff. If the employer carries this burden, the legal presumption of unlawful discrimination "drops out of the picture." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). Once this occurs, the Supreme Court articulated the overall process:

> The Appellee's "production" (whatever its persuasive effect) having been made, the trier

> of fact proceeds to decide the ultimate question: whether Appellant has proven "that the Appellee intentionally discriminated against [the Appellant]", [Burdine, 450 U.S. at 253]. The factfinder's disbelief of the reasons put forward by the Appellee (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the Appellee's proffered reasons, will permit the trier of discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required," 970 F.2d, at 492 (emphasis added).

Hicks, 509 U.S. at 511 (footnote omitted).

Thus, according to Hicks, when the Petitioner's evidence of pretext challenges Texaco's articulated nondiscriminatory reason, such evidence may serve as well to support a reasonable inference that discrimination was a motivating reason for the employer's decision. As the Supreme Court has observed, "when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reasons, based his decision on an impermissible consideration such as [sex or retaliation]." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1977).

Based upon the foregoing, does evidence of pretext alone support an inference of intentional discrimination? A

recent in banc decision by the Third Circuit in Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061 (3d Cir. 1996) (in banc), answers this question in the affirmative. This decision contains a discussion of the varying standards and interpretation of Hicks by the Circuit Courts. In that decision Chief Judge Dolores K. Sloviter wrote:

> [W]e have understood Hicks to hold that the elements of the prima facie case and disbelief of the Appellee's proffered reasons are the threshold findings, beyond which the jury is permitted, but not required, to draw an inference leading it to conclude that there was intentional discrimination.

Id. at 1066-67.[7]

In sum, when the employer produces a nondiscriminatory reason for its actions, the prima facie case no longer creates a legal presumption of unlawful discrimination. The elements of the prima facie case remain, however, and if they are accompanied by evidence of pretext and disbelief of Texaco's proffered explanation, they may permit the jury to find for the Petitioner.

A recent in banc decision of the Eighth Circuit in Ryther v. KARE, 11, No. 94-3622, decided March 6, 1997, provides a slightly better interpretation of Hicks. In that case the Court concluded that evidence of pretext does not always

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The Third Circuit noted that other federal courts of appeals have interpreted Hicks in a similar manner, citing cases from the D.C. Circuit, the Second Circuit, the Fourth Circuit, the Six Circuit, the Seventh Circuit, the Eighth Circuit, and the Ninth Circuit. See Sheridan, 100 F.3d at 1067-68.

support an inference of discrimination. In reading its decision the Court stated that:

> "[t]his is not to say that, for the Appellant to succeed, simply proving pretext is necessarily enough. We emphasize that evidence of pretext will not by itself be enough to make a submissible case if it is, standing alone, inconsistent with a reasonable inference of age discrimination." (emphasis supplied).

Furthermore, as the Hicks Court explained, the Petitioner must still persuade the jury, from all the facts and circumstances, that the employment decision was based upon intentional discrimination.[8] 509 U.S. at 511 n.4.

Readily apparent from the Ryther decision is that in all sex discrimination cases, the Appellant must produce sufficient evidence of the elements of the prima facie case and where necessary, adduce sufficient proof of pretext to meet the traditional tests of summary judgment. According to Ryther summary judgment should be denied if the Appellant offers sufficient proof of pretext which is not

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[8] Thus, Hicks makes it clear that the Appellant must show "both that the reason was false, and that discrimination was the real reason," 509 U.S. at 515. "It is not enough, in other words, to disbelieve the employer; the factfinder must believe the Appellant's explanation of intentional discrimination." Id. at 519. It is equally clear, however, that "rejection of the Appellee's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination and...'[n]o additional proof of discrimination is required.'" Id. at 511 (internal citation omitted). As Justice Scalie explained, "rejection of the Appellee's proffered reasons is enough at law to sustain a finding of discrimination," but "there still must be a finding [by the finder of fact] of discrimination." Id. at 511 n.4.

inconsistent with a reasonable inference of retaliation and/or sex discrimination.

A recent in banc decision of the Second Circuit in Fisher v. Vassar College, 70 Fed. 3d 1420 (Second Circuit 1996), provides an even more confusing interpretation of Hicks. In that case a sharply divided Court determined that it could act as a "super jury" in employment discrimination cases, and attempted to articulate the evidentiary standards for employment discrimination plaintiffs at the pre-trial, summary judgment stages of litigation, as well as the post-trial stages of litigation.

In this case since the Petitioner's evidence of pretext is not inconsistent with a reasonable inference of sex discrimination or retaliation, therefore summary judgment was improper under the legal reasoning in Ryther. This court should reject the legal reasoning contained in Fisher v. Vassar College as it relates to motions for summary judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted this 3rd day of September, 1997.

KEVIN P. BARRY, ESQ.
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CHARLENE MCGOWAN,

Plaintiff,

vs.

TEXACO INC.,

Defendant.

No. 93 Civ. 0615 (CLB)

United States District Court, Southern District
Memorandum and Order dated April 4, 1996.

The plaintiff Charlene McGowan filed this action against her former employer, Texaco Inc. ("Texaco"), for sex-based discrimination and unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1988 & Supp. V 1993) and New York State law. Texaco has moved for summary judgment pursuant to Fed. R. 56. The Court grants Texaco's motion based upon the reasoning set forth below.

Background

In October 1990, Texaco hired Ms. Charlene McGowan to work in the Central Waste Site Management Unit of its Environment, Health and Safety Division in Beacon, New York as an Environmental/Administrative Analyst. Ms. McGowan interviewed for the position with Mr. Ronald Richards, the manager of the Environmental Health and Safety Division, and Mr. Harold Weiss, the manager of the Central Waste Site Management Unit. Ms.

McGowan included with her application copies of her college transcript and resumes documenting her health and science background. Ms. McGowan represented to Texaco that she received a Bachelors Degree from Bard College where she double majored in Biology and Literature and minored in Chemistry.

As a Texaco employee, Ms. McGowan was entitled to the benefits of Texaco's Performance Management Program ("PMP") including job-related developmental opportunities and activities. After several months of employment, Ms. McGowan claims that she approached Mr. Weiss to discuss training, continued education, and special committee membership. However, Ms. McGowan contends that she was excluded from training workshops concerning issues that were central to her responsibilities at Texaco. Ms McGowan further claims that Mr. Weiss discouraged her from applying to the Renssalaer Polytechnic Institute Masters Degree Program offered by Texaco to its professional employees. In addition, Ms. McGowan asserts that Mr. Weiss denied her a valuable employment opportunity in not assigning her a "major steering" committee such as the Texaco Award for Excellence Committee.

In November 1991, after hearing a company-wide taped presentation by James W. Kinnear, President of Texaco, concerning the corporation's equal employment opportunities and non-discriminatory policies, which in essence urged people to present claims of discrimination, Ms. McGowan approached Bud Foucher, a Human Resources Manager in Texaco's Research and Development Department at Beacon, to complain about Mr. Weiss. Mr. Foucher requested that she submit her complaint in writing. In response, Ms. McGowan delivered a three and one-half page

written complaint to the Beacon Human Resources Department expressing her dissatisfaction with Mr. Weiss. Ms. McGowan also voiced a concern that her July 12, 1991 Performance and Development Review, which contained an evaluation by Mr. Weiss, was not a fair reflection of her work at Texaco and took an administrative appeal. Ms. McGowan received a performance rating of "Usually Meets Standards" in all of the categories of the PMP Form. This rating is equivalent to "Good Performance," something less than "Strong" or "Outstanding," and represents a passing grade.[9]

In response to Ms. McGowan's complaint, Texaco followed its standard appeals process with respect to employee Performance and Development Reviews. Mr. Weiss reviewed and prepared a detailed explanation of his evaluation of Ms. McGowan's work, and Mr. Richards, the Division Manager, prepared written comments in response to Ms. McGowan's complaint. An Appraisal Appeals Committee, comprised of three Texaco employees, then considered Ms. McGowan's memorandum, Mr. Weiss' response, and Mr. Richards' comments. The Committee concluded unanimously that the "evidence did not support changing [the performance evaluation] rating." The Committee explained that Ms. McGowan had a "very serious problem in [her] understanding of [her] role at Texaco and [her] relationship with her supervisor." While the Committee offered to try to resolve the perceived problems between Ms.

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[9] A person who meets most of their "stretch" objectives in the PMP process receives a "Usually Meets Standards" rating. The "Consistently Meets Standards" and "Exceeds Standards" ratings indicate increasingly higher levels of achievement.

McGowan and Mr. Weiss, Ms. McGowan rejected the Committee's offer of assistance. Texaco's review of Ms. McGowan's July 12, 1991 PMP Form was thus ended.

On February 12, 1992, Mr. Richards and Mr. Weiss met with Ms. McGowan to outline her performance expectations for the PMP cycle beginning February 10, 1992. Ms. McGowan was told that she would be permitted to go forward on a "clean slate" and that her past "errors, disruptions, [and] complaints...[would] be set aside in the evaluation of her performance during the next PMP cycle." However, Mr. Richards explained to Ms. McGowan that her "failure to make significant progress would result in an unsatisfactory performance rating and could lead to disciplinary action up to and including discharge." Mr. Richards reiterated that if Ms. McGowan felt her performance was being affected by job-related stress or factors outside of work, she should seek counseling provided by Texaco's Special Health Services Group, as had been suggested to her on at least four prior occasions. On February 26, 1992, Ms. McGowan was scheduled to meet with Mr. Weiss to discuss her new performance objectives, but she did not attend the conference. Instead, Ms. McGowan went to the Beacon Medical Facility "due to severe work stress precipitated by...threats of termination. The next day, Ms. McGowan took a sick day followed by a four month leave of absence with full pay and benefits based upon her physician's diagnosis that she was suffering from a work-related stress disorder.

When Ms. McGowan returned to Texaco on July 1, 1992, she was again to begin on a "clean slate." Ms. McGowan's job responsibilities in the Central Waste Site Management Unit had been reassigned to other Texaco

employees, but she was given new duties in the Environmental & Product Safety Department's Product Safety Unit at the same grade level and pay. On January 25, 1993, Ms. McGowan was scheduled to meet with Ms. Cynthia Cain, her new supervisor in the Product Safety Unit to discuss her PMP Form for the six month period since she had returned to Texaco, but Ms. McGowan again failed to appear and instead went to the Beacon Medical Department. At the medical facility, Ms. McGowan was advised to call her supervisor before leaving at the end of the day. Ms. McGowan did not call Ms. Cain as she had been directed, and Texaco subsequently sent her a letter of termination for poor work performance and insubordination.

Ms. McGowan claims that Mr. Weiss refused on the basis of gender to provide her certain benefits to which she was entitled under Texaco's Performance Management Program. Specifically, Ms. McGowan contends she was denied meaningful training, continued education, and opportunities for advancement while she was employed by Texaco. In response to her internal complaints of discriminatory treatment, Ms. McGowan claims that Texaco not only denied the misconduct, but also attempted to conceal her complaint. In retaliation, Ms. McGowan alleges that Texaco demoted her, forced her to undergo psychiatric evaluation, placed statements that were damaging to her career in a personnel file, and eventually terminated her employment.

Texaco defends its challenged employment decisions by explaining that during the course of her employment, Texaco discovered that Ms. McGowan was guilty of poor work performance and insubordination and showed signs of severe emotional problems. On December 9, 1991, Ms.

McGowan was reprimanded for spreading an unconfirmed report that twelve sex discrimination claims had been filed with the Beacon Human Resources Office. Mr. Richards explained to Ms. McGowan that the information she conveyed "was blatantly untrue and severely upset the [employees] she told." As a result, Ms. McGowan was warned that her office behavior would be monitored for the following four to six months and that any reoccurrence of this type if misconduct could result in "disciplinary action up to and including discharge."

Texaco contends that while Ms. McGowan was an employee at Texaco, it became increasingly clear that her work performance was unsatisfactory. In response to Mr. McGowan's appeal of her July 12, 1991 Performance and Development Review, Mr. Richards requested an assessment of Ms. McGowan's skills from several other Texaco employees for whom she had worked. Each of the ten employees who responded to Mr. Richards revealed that Ms. McGowan was not performing her job responsibilities in a satisfactory manner. During Ms. McGowan's four month leave of absence, Texaco learned the Ms. McGowan had on numerous occasions "inaccurately reported the amounts spent on waste site remediation and the amounts recovered from insurers." Texaco further discovered that Ms. McGowan had mishandled several large checks. Specifically, Ms. McGowan had overpaid a vender by $201,622.87 and failed to deposit a check from an insurer for $209,962.92.[10] Even after Ms. McGowan returned to Texaco on July 1, 1992, the

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[10] The check from the insurer in the amount of $209,962.92 was found in Ms. McGowan's desk one year after it should have been processed and deposited.

reviews of her work performance remained less than favorable.

Finally, Texaco claims that Ms. McGowan suffered from serious emotional problems. On two separate occasions, Ms. McGowan failed to attend scheduled meetings to discuss her PMP Reviews and instead went to the Beacon Medical Department. The Texaco Medical Department's records confirm that Ms. McGowan visited the facility on numerous occasions over an eighteen month period when she was not ill and received no medical treatment. In addition, Texaco explains that prior to Ms. McGowan's four month leave of absence, her own physician diagnosed her with a stress disorder.

On March 6, 1992, Ms. McGowan filed a complaint with the New York State Division of Human Rights alleging that Texaco discriminated against her on the basis of her sex in the terms, conditions, rights and privileges of her employment. Ms. McGowan claimed that Texaco "maintained policies and practices...which unlawfully operate[d] to deny equal opportunities to females because of their sex." In addition, Ms. McGowan alleged that Texaco refused to take corrective action and retaliated against her as a result of the internal complaints she made of alleged discrimination. Ms. McGowan also pursued her claims with the Equal Employment Opportunity Commission ("EEOC"). the EEOC issued Ms. McGowan a "Notice of Right to Sue" letter on November 11, 1992. On January 5, 1993, the State Division dismissed Ms. McGowan's complaint at her request on the ground of "administrative convenience." Ms. McGowan then filed this action on February 1, 1993 alleging sex discrimination and unlawful retaliation in violation of Title VII of the Civil Rights Act of 1964, as amended, 42

U.S.C. § 2000e et seq. and state law claims. On September 10, 1993, Judge Goettel denied Ms. McGowan's motion for class certification. Texaco now seeks summary judgment on the remaining claims in Ms. McGowan's complaint.

Discussion

Fed. R. Civ. P. 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Court must view the evidence "in the light most favorable to the non-movant and...draw all reasonable inferences in its favor." Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990), cert. denied, 500 U.S. 928 (1991). Summary judgment is appropriate if based upon the record, "there is no genuine issue as to any material fact[,] and the moving party is entitled to judgment as a matter of law." Anderson v. Liberty Lobby, 477 U.S. 242 250 (1986).

In Title VII cases, summary judgment is proper in certain circumstances despite the fact that a party's intent is at issue. In Meriri v. Dacon, 759 F.2d 989, 998 (2d Cir.), cert denied, 474 U.S. 829 (1985), the Second Circuit explained:

> We are of course mindful that summary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated. The summary judgment rule would be rendered sterile, however, if the

> mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion. Indeed, the salutary purposes of summary judgment--avoiding protracted, expensive and harassing trials--apply no less to discrimination cases then to commercial or other areas of litigation.

Ms. McGowan's Discrimination Claim

In Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981), the Supreme Court developed a three-step burden shifting analysis to be employed in evaluating discrimination cases under Title VII.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

(quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

To prove a sex discrimination claim under Title VII, Ms. McGowan must show that Texaco discriminated against

her "with respect to...compensation, terms, conditions or privilege of employment" because of her sex. 42 U.S.C. § 2000-2(a). To make a prima facie showing of sex discrimination, Ms. McGowan must demonstrate that (1) she is a member of a protected class, (2) she was entitled to certain terms, conditions and privileges of employment, (3) she was denied those terms, conditions and privileges of employment, and (4) that such denial was under circumstances giving rise to an inference of sex discrimination. McDonnell Douglas, 411 U.S. at 802.

Ms. McGowan claims that Mr. Weiss failed to afford her the privileges of Texaco's Performance Management Program and "thereby denied her valuable developmental opportunities" including "technical training, technical assignments and projects, substantive committee [and] task force work, continuing education and other recognition opportunities." Ms. McGowan contends that Mr. Weiss' "deviation from an established company policy with respect to [her], the only female in her unit, raises an inference of discrimination."

While Ms. McGowan argues at length that Mr. Weiss did not follow the procedures outlined in the Performance Management Program, she fails to show that Mr. Weiss did not comply with the Performance Management Program, thereby denying her valuable developmental opportunities, because of her sex. Based upon the evidence, it is clear that Ms. McGowan received internal training and opportunities for advancement consistent with her job responsibilities. Ms. McGowan has not made out a sex discrimination claim by showing that in fact she was denied developmental opportunities, which were offered to other male employees in her unit who possessed more advanced scientific and

technological qualifications. Texaco hired Ms. McGowan as an Environmental/Administrative Analyst in the Central Waste Site Management Unit "to coordinate Texaco's insurance claims for waste site remediation expenses, to maintain a computerized database on waste site expenditures and amounts recovered from Texaco's insurers, and to provide periodic status reports based on the information in the database." Ms. McGowan was further expected to "keep abreast of new technology" in the area of "computerized database management," and to "[d]evelop basic understanding of regulatory issues." As an Environmental/Administrative Analyst, Ms. McGowan received the training necessary to her job responsibilities, and, during her first six months at Texaco, Ms. McGowan received more training than any other employee in the Central Waste Site Management Unit.

In the Central Waste Site Management Unit, Ms. McGowan worked with Mr. Weiss, six Environmental Engineers, an one male Environmental Associate. Ms. McGowan's degree is in English Literature only. According to Ms. McGowan, Texaco "employees without superior qualifications or advanced degrees are denied opportunities for technical assignments and technical training." Ms. McGowan claims that because she "was the only lower-level employee in her unit, it can be inferred that sex was a motivating factor [in the different treatment she received at Texaco,] and not her background." This Court disagrees. Texaco may lawfully treat its employees differently based upon their superior, inferior or different educational qualifications. Texaco's business decisions to offer particular male employees continued education, technical training, and other opportunities for advancement including committee membership, based upon their engineering and scientific educational backgrounds and experience fail to give rise to

an inference of sex discrimination. See e.g. Lloyd v. WABC-TV, 879 F.Supp. 394, 402 (S.D.N.Y. 1995); Miller v. Swissre Holding, Inc.,771 F.Supp. 56, 59 (S.D.N.Y. 1991).

Ms. McGowan's Retaliation Claim

Ms. McGowan further claims that Texaco retaliated against her for internal complaints she made of alleged sex discrimination by Mr. Weiss. Specifically, Ms. McGowan alleges that Texaco demoted her to a position of lesser responsibility and forced her to undergo psychiatric examination, placed damaging evaluations in her personnel file, and ultimately discharged her. To make out a prima facie case of retaliation under Title VII, a plaintiff must show that: (1) she was engaged in protected activity which was known to the defendant, (2) she suffered adverse employment action, and (3) there was a causal connection between the protected activity and the adverse employment action. Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995); Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1038-39 (2d Cir. 1993); Johnson v. Palma, 931 F.2d 203, 207 (2d Cir. 1991). However, a plaintiff cannot make out a retaliation claim under Title VII where the evidence clearly demonstrates that the employer had legitimate, non-retaliatory reasons for its employment decisions. Tomka, 66 F.3d at 1308; Johnson, 931 F.2d at 207 (citing Taitt v. Chemical Bank, 849 F.2d 775, 777 (2d Cir. 1988)).

Texaco claims that Ms. McGowan's claim cannot survive "[i]n the face of overwhelming and irrefutable evidence of [her] unacceptably poor work performance, extreme emotional problems, and insubordination." This Court agrees. Ms. McGowan has provided insufficient

evidence to allow a reasonable jury to infer that Texaco's challenged actions were retaliatory in nature. Texaco has demonstrated that it had legitimate, non-retaliatory reasons for all of its challenged employment decisions.

Ms. McGowan's allegations that Texaco solicited negative information regarding her performance and demoted her in retaliation for her internal complaints of sex discrimination are without foundation. Texaco explains that Mr. Richard's solicitation of information from other employees concerning Ms. McGowan's work performance was in response to Ms. McGowan's appeal of her July 12, 1991 PMP Review Form, which included an evaluation by Mr. Weiss. In fact, by letter dated December 4, 1991, Ms. McGowan requested that upper management "assist in the writing and grading of [her] future evaluations...to ensure that they [we]re fair." Based upon the largely negative feedback received, Ms. McGowan cannot claim that Mr. Richards efforts to solicit information fostered a "Get McGowan" atmosphere. Mr. Richard's inquiries were the result of Ms. McGowan's own requests, and the work performance evaluations he received appeared reliable.

Texaco's decision to reassign Ms. McGowan to a position in the Product Safety Unit where she would no longer be under the supervision of Mr. Weiss cannot be considered retaliatory in nature. Ms. McGowan had taken a four month leave of absence based on her claim of disability. During that period, Texaco was forced to reassign her responsibilities to other employees. In addition, Texaco had learned that prior to her leave of absence, Ms. McGowan had performed her work duties unsatisfactorily, and she had shown signs of emotional instability. Texaco also had discovered that Ms. McGowan had not received a Biology

Degree as she had represented on her employment application and resume. Based on the foregoing, Ms. McGowan's new assignment to the Product Safety Unit, at the same grade and pay, where she was transferred to the supervision of Ms. Cain was legitimate and non-retaliatory.

Furthermore, Ms. McGowan completely fails to rebut Texaco's showing that her job performance was unsatisfactory, and that she was fired for her poor work performance and insubordination. In response to Mr. Richard's inquiries about Ms. McGowan's job skills, Texaco employees described Ms. McGowan's behavior as "defensive" and "out of control." One Texaco employee explained:

> "[Ms. McGowan's] job performance...had a negative impact on the term. She...sought to define her own job responsibilities,...not accepting various job functions in support of the group. Her attitude...led to several team members not wanting to work with her unless the job require[d] it, thereby eliminating normal/routine communication and information exchange which constitutes good team work."

Numerous Texaco employees also reported that Ms. McGowan had spread the false rumor or report that twelve or thirteen sexual discrimination claims had been filed at the Beacon Human Resource Department. Certain Texaco employees responded that Ms. McGowan's statements made them "angry" and "uncomfortable." Texaco reprimanded Ms. McGowan for this misbehavior on December 9, 1991.

Texaco employees also expressed concern that Ms. McGowan was incapable of carrying out her assigned tasks. One employee explained that "Ms. McGowan d[id] not actively listen to what [wa]s being told to her and therefore [wa]s unable to immediately grasp a situation causing unnecessary time wasted." According to another employee, "[in the] isolated instances where information was requested from [Ms. McGowan],...the requests [were] always accompanied by a great deal of defensiveness and [a] lack of understanding of the data needed." Even after Ms. McGowan returned from her four month leave of absence, her poor work performance evaluations continued. Ms. McGowan's Current Performance Report, dated August 11, 1992, explained that Ms. McGowan "resisted working on the [performance] objectives [that] she d[id] not like." In addition, "Ms. McGowan [was] not yet at full productivity, in spite of...efforts to give her...easily achievable objectives for the first six weeks. The Report continued that "[Ms. McGowan] spent considerable time questioning everything and everyone over and over again." Ms. McGowan did not attend the meeting scheduled to discuss her Performance and Development Review for the six month period since she returned to Texaco in July 1992. Based upon the serious concerns raised by Ms. McGowan's coworkers and supervisors, Texaco's termination cannot be said to have been retaliatory in nature.

Ms. McGowan has failed to demonstrate that Texaco retaliated against her by requiring her to undergo psychiatric evaluation prior to returning to work after her leave of absence. Ms. McGowan's record indicates that on several occasions, she arrived at the Beacon Medical Department "in tears" and "distressed over [her] work situation." Ms. McGowan's own physician diagnosed her with a stress

disorder just prior to her four month leave of absence in March 1992. Texaco acted well within it authority as an employer when Mr. Richards explained to Ms. McGowan that she would have to contact Texaco's Special Health certified [her] as fit" to work. Based upon the evidence, Texaco clearly acted in a legitimate and nondiscriminatory manner when it requested that Ms. McGowan by evaluated by a psychiatrist.

Ms. McGowan's assertion that her poor work performance and paranoia were caused by the problems she encountered at Texaco is without merit. Ms. McGowan's emotional problems have been documented as far back as 1981 by her professors at Bard College who commented that she was "harassed by [her] workload" and unable to complete required course work due to her "severe personal problems" and "insecurity." Ms. McGowan's consistently poor work performance and pre-existing emotional instability are confirmed by her prior employers.

Ms. McGowan attempts to make too much out of an alleged inconsistency in the deposition testimony of Mr. Bud Foucher which was taken on August 16, 1993 and again on September 13, 1994. In support of her retaliation claim, Ms. McGowan claims that Mr. Foucher attempted "to conceal the very existence of [her] complaint of sex discrimination." On August 16, 1993, Mr. Foucher testified that Ms. McGowan approached him with "complaints of sex discrimination." However, on September 13, 1994, Mr. Foucher did not characterize Ms. McGowan's complaint as alleged sex discrimination. Mr. Foucher explained that the complaint "could probably be confused with sex discrimination," but he didn't "think it was classified as that at the time." In light of Texaco's clear showing of its legitimate reasons for all of its

actions, Mr. Foucher's testimony is insufficient to make out Ms. McGowan's claim of retaliation.

In conclusion, Ms. McGowan has provided absolutely no evidence which would allow a reasonable jury to find by a preponderance of the credible evidence that Texaco's conduct resulted from discriminatory or retaliatory intent. Extensive discovery has been taken in this action which has been pending in this Court since February 1, 1993. Yet Ms. McGowan makes only conclusory statements and unsupported arguments in support of her discrimination and retaliation claims. Ms. McGowan also has completely failed to rebut Texaco's legitimate explanations for its challenged actions.

For the foregoing reasons, Texaco Inc.'s motion for summary judgment is granted. This Court declines to exercise supplemental jurisdiction over Ms. McGowan's remaining state claims. Therefore, those remaining claims are dismissed without prejudice.

SO ORDERED.

Dated: White Plains, New York
April 4, 1996

CHARLES L. BRIEANT, U.S.D.J.

CHARLENE MCGOWAN,

Plaintiff,

vs.

TEXACO INC.,

Defendant.

No. 93 Civ. 0615 (CLB)

United States District Court, Southern District
Judgment dated April 4, 1996.

Defendants having moved for summary judgment and the said motion having come before the Honorable Charles L. Brieant, United States District Judge and the Court thereafter on April 4, 1996, having handed down its memorandum and order, granting the defendants' motion it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed.

Dated: White Plains, N.Y.
April 4, 1996

JAMES M. PARKISON, CLERK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

96-7548

PRESENT:

Honorable Richard J. Cardamone,
Honorable Pierre N. Leval,
Circuit Judges,

Honorable Robert J. Ward,
District Judge[11]

Charlene McGowan,

Plaintiff-Appellant,

v.

Texaco, Inc.,

Defendant-Appellee.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern

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[11] The Honorable Robert J. Ward of the United States District Court for the Southern District of New York, sitting by designation.

District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Charlene McGowan appeals from the judgment of the district court granting Texaco's motion for summary judgment and dismissing McGowan's employment discrimination complaint brought under Title VII, 42 U.S.C. § 2000e et seq. McGowan alleged that on account of her sex Texaco denied her opportunities for advancement and then retaliated against her for complaining about this unequal treatment, ultimately by firing her. Finding no reason to reverse, we affirm the judgment of the district court.

McGowan complained that her supervisor at Texaco excluded her from desirable technical training and job projects and from prime committee assignments, all of which were offered to men in her job unit. All of these decisions were entirely justified, however, by the undisputed fact that the men who received these opportunities were employed as engineers, which McGowan was not, and were senior to McGowan. McGowan's discrimination claim thus falls under the rule of Holt v. KMI-Continental, 95 F.3d 123 (2d Cir. 1996). She has failed to "put forth adequate evidence to support a rational finding that the legitimate non-discriminatory reasons proffered by the employer were false, and that more likely than not the employee's sex...was the real reason" for the challenged employment decisions.

McGowan's retaliation claim also fails. She has not submitted evidence raising a jury question on the issue of causation. The actions McGowan asserts were retaliatory,

including her eventual discharge, were clearly and indisputably justified by overwhelming and uncontradicted evidence of McGowan's poor job performance, insubordination, and inability or refusal to get along with her coworkers and superiors. This evidence concerned episodes both before and after McGowan made her initial complaint. On this record any rational factfinder would have to find that what McGowan characterizes as retaliation was at least partly motivated by legitimate dissatisfaction with McGowan's performance and would have occurred absent any retaliatory or discriminatory animus. Such a finding is sufficient to preclude liability for an employer. See Cosgrove v. Sears, Roebuck & Co., 9 F.3d 1033, 1040 (2d Cir. 1993). Summary judgment was therefore appropriate.

Affirmed.

Hon. Richard J. Cardamone, U.S.C.J.

Hon. Pierre N. Leval, U.S.C.J.

Hon. Robert J. Ward, U.S.D.J.

(2) 97-827

No. __-____

Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CHARLENE MCGOWAN,

Petitioner,

—v.—

TEXACO INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TEXACO INC.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should the Petition for Certiorari be dismissed as untimely?

2. Should certiorari be denied for lack of jurisdiction because the Petition does not present any of the reasons for granting certiorari set forth in Rule 10 of the Rules of the Supreme Court of the United States, or any other compelling reason for granting certiorari?

3. Should certiorari be denied because the Petition seeks nothing more than a review of the application by a district court and a unanimous court of appeals of settled law to the particular facts of an individual case based on the record evidence?

STATEMENT PURSUANT TO SUPREME COURT RULE 29

Respondent TEXACO INC. is a Delaware Corporation with stock traded on the New York Stock Exchange. TEXACO INC. has no parents, subsidiaries, or affiliates that have issued shares to the public, except Texaco Capital L.L.C. and Texaco Capital Inc.

ARGUMENT

The Petition for a Writ of Certiorari purportedly seeks review of two questions, neither of which is appropriate for certiorari. As an initial matter, certiorari should be denied because it appears that the Petition is untimely. Certiorari should be denied on the additional ground that the Petition does not raise any of the reasons for granting certiorari listed in Rule 10 of this Court's Rules or any other compelling reason for granting certiorari. The issues raised by the Petition are limited to the application of the particular facts of this case, based on undisputed record evidence, to well-settled law.

I. The Petition for a Writ of Certiorari Appears Untimely

Respondent represents to the Court that:

1. As stated in the Petition: "On March 21, 1997 the Court of Appeals affirmed the judgment of the District Court by Summary Order and

Memorandum Decision. On April 2, 1997 a Petition for Rehearing and Rehearing In Banc was filed, and on June 6, 1997, the Court of Appeals upheld the judgment of the District Court." (Petition at 2).

2. No application to extend the time for filing a petition for writ of certiorari was made. The last day to petition for a writ of certiorari was September 4, 1997. On that date, petitioner mailed a defective petition to the Court, received on September 8, 1997. (Respondent does not appear to have received a copy).

3. On September 10, 1997, the Clerk of this Court wrote Petitioner's counsel, specifying seven violations of this Court's Rules and giving Petitioner's counsel time to return a petition complying with the Rules. The Clerk gave counsel the maximum time allowed by Rule 14.5, which requires that the corrected petition actually be "received no more than 60 days after

the date of the Clerk's letter . . . ." (emphasis added).

Thus, the Clerk's letter explicitly cautioned:

> "Unless the petition is received by this Office in corrected form within 60 days of the date of this letter, the petition will not be filed" (emphasis added).

4. No corrected petition was received within that time period, the 60th day being November 9, 1997. It was not until the 61st day, Monday, November 10, 1997, that the new Petition was even put in the mail, with several more days elapsing before it was "received" by the Clerk.

5. Had Rule 14.5 provided for "filing" within 60 days, the mailing on Monday, the 61st day, would have been timely. However, the Rule and, accordingly, the Clerk's letter, are explicit that here (in contrast to "filing"), the corrected petition must be "received no more than 60 days after the date of the Clerk's letter . . . ." Respectfully, the Petition was thus

untimely and the Court appears without jurisdiction to grant it.

II. The Questions Presented Are Not Appropriate For Certiorari

Petitioner asserts that jurisdiction to grant certiorari exists in this case pursuant to Rule 10(a) and (c) of the Rules of the Supreme Court of the United States. Rule 10(a) provides that certiorari may be granted, in the discretion of the Court, in cases where:

> a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory powers.

Rule 10(c) lists a similar set of circumstances, namely:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should

> be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Nothing in the Petition even suggests any of these circumstances exist in this case. To the contrary, the only issues raised by the Petition concern Petitioner's disagreement with the district court's and the court of appeals' application of the particular facts of this case, based on undisputed record evidence, to legal standards already well-established by this Court's precedent.

The Petition itself makes clear that all the issues raised in the Petition are limited to the particular circumstances of this case and have no application or importance to any other case. For example, the Petition notes that the court of appeals affirmed the district court's grant of summary judgment dismissing plaintiff's claim of discrimination with respect to employment opportunities based on a review of the record evidence,

which demonstrated that "all of [Texaco's] decisions were entirely justified . . . by the undisputed fact that the men who received these opportunities were employed as engineers, which McGowan was not, and were senior to McGowan." (A copy of the court of appeals' decision is annexed to the Petition). Petitioner concedes the court of appeals correctly held that "Texaco could treat its employees differently based on their respective backgrounds and education," and she points to no error of law or fact that would justify granting certiorari on this point. (Petition at 11).

Instead, Petitioner seeks certiorari in order to have this Court review her allegation that she was not given appropriate "career development." (Petition at 11). Thus, Petitioner alleges, "What the Petitioner claims as discriminatory is the complete absence of career development for the Petitioner by her immediate supervisor Harold Weiss. The record establishes that

Weiss did not engage in any career development for Petitioner during the period from November 1990 through July 12, 1991 when Weiss sat down with her for five minutes to give her an annual review of her performance." (Petition at 11).

This allegation, as with Petitioner's allegation concerning other employment "opportunities" at Texaco, fails on its face because Petitioner does not assert (and did not assert in the district court or the court of appeals) that male employees were treated any differently than she was with respect to "career development" or performance reviews. Moreover, even if Petitioner had made that allegation in the district court, the only issue presented for certiorari would be whether the district court and the court of appeals properly reviewed the undisputed facts established by the specific record evidence in this case to determine that plaintiff failed to raise a genuine issue of material fact with respect to alleged disparate treatment.

Similarly, with respect to Petitioner's claim of retaliation, Petitioner concedes the court of appeals affirmed the district court's grant of summary judgment dismissing her claims because Petitioner failed to present any evidence to rebut Texaco's legitimate, non-discriminatory reasons for terminating Petitioner's employment. Specifically, the district court and the court of appeals found that, based on a review of all the evidence in the record, it was undisputed that the termination was motivated "by legitimate dissatisfaction with McGowan's performance and would have occurred absent any retaliatory or discriminatory animus." Both courts also found that "actions McGowan asserts were retaliatory including her eventual discharge, were clearly and indisputably justified by overwhelming and uncontradicted evidence of McGowan's poor job performance, insubordination and inability or refusal to get along with co-workers and supervisors."

Petitioner's only response to this finding by both the district court and a unanimous court of appeals is that "the Petitioner established a prima facie case of retaliation." (Petition at 13). This assertion misses the point. As this Court's established precedent makes clear, once an employer has articulated a legitimate non-discriminatory reason for its actions, any presumption of discrimination that arises from establishment of a *prima facie* case disappears and the plaintiff has the burden of coming forward with evidence sufficient to prove that the employer's proffered reasons were pretextual and that the true reason for the employment decisions was discrimination or retaliation. See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993). Moreover, to the extent the Petition seeks review of the particular record evidence in this case to determine whether this Court would agree with the conclusions reached by the district court and the unanimous court of appeals, such a

limited and case-specific inquiry does not constitute the type of compelling reason necessary to exercise this Court's authority to grant certiorari.

Accordingly, in the absence of any of the circumstances listed in this Court's Rules or any other compelling reason for granting certiorari, and because the Petition seeks nothing more than a review of the district court's application of settled law to case-specific facts, the Petition should be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition should be denied.

Dated: December 17, 1997 Respectfully submitted,

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